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Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-13

W. A. BOYLE, C. W. DAVIS, and JOSEPHINE ROCHE, TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,
Petitioners,

v.

THOMAS LAVELLA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,

v.

THOMAS LAVELLA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on April 16, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this Petition at pages 1a to 6a.

JURISDICTION

The judgment and opinion of the Court of Appeals for the District of Columbia were entered on April 16, 1971 (App. 1a-6a). A Petition for Rehearing *En Banc* was filed by these petitioners on April 29, 1971 and denied by action of the Court on May 12, 1971 (App. 7a).

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Are the trustees of a retirement fund created pursuant to Section 302(c)(5), Labor Management Relations Act, 1947, required to hold that pension rights *vest* in an applicant upon his involuntary separation from employment due to permanent disability from causes endemic to the industry and who met all eligibility requirements then in effect except age, on the ground that his pension rights vested upon such involuntary separation, even though upon reaching the eligibility age fifteen years later he failed to meet the requirements as subsequently amended, when under admitted trust authority neither Section 302(c)(5), nor the Trust Indenture, provides for or requires such vesting?

STATUTES AND RESOLUTIONS INVOLVED

The pertinent portions of the statutes and resolutions involved, if not quoted in the text, are set forth in the Appendix to this Petition at pages 7a to 20a.

STATEMENT OF THE CASE

A. Introductory

Section 302(c)(5) of the Labor Management Relations Act, 1947 (61 Stat. 157, 29 U.S.C. § 186(c)(5)),[1] authorizes employers to make payments to trust funds established by employers and unions for the exclusive benefit of the employers' employees, their families and dependants, provided the criteria established in Section 302(c)(5) is met. This case involves the administration of one such trust fund, the United Mine Workers of America Welfare and Retirement Fund of 1950 (hereinafter the "Fund") which was established by the Trust Indenture contained in the National Bituminous Coal Wage Agreement of 1950 (hereinafter the "Wage Agreement").[2] The petitioners are the three Trustees of the Fund.

The Wage Agreement, which was entered into on March 5, 1950 by various bituminous coal operators and the United Mine Workers of America, International Union, was the outcome of collective bargaining to fix the terms of industrial relations, wages and other conditions of employment, between the coal operators and their employees as represented by the Union. The Trust Indenture provided for the establishment of the Fund for the benefit of employees of the operators and their families, the Fund's moneys to be derived from the operators' payment to the Fund of a fixed amount per ton of coal that the operator produced during the period of the Wage Agreement.

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[1] This section is set out in Appendix hereto, pages 7a-8a.

[2] The pertinent portions of the Trust Indenture are set out in Appendix hereto, pages 8a-14a.

Pursuant to Section 302(c)(5), the Trust Indenture provided the Fund would be administered by three Trustees, one appointed by the Union, another by the employers and the third, the neutral Trustee, selected by the other two. The Trustees were vested with full authority with respect to "questions of coverage and eligibility" for Fund benefits and they were empowered to resolve in writing the "detailed basis upon which payments from the Fund will be made." The Trustees established pension eligibility requirements under the authority of the Trust Indenture and, at various times, they have amended those eligibility requirements as they deemed necessary in light of their experience.

The initial detailed basis for payment was contained in Resolution No. 10 which the then Trustees adopted on April 5, 1950.[3] This Resolution provided, *inter alia,* that an applicant must have worked in the coal industry for twenty years and have reached the age of 60 years in order to qualify for a retirement pension. It also provided it "shall be subject to amendment, revocation and revision at the discretion of the Trustees." (App. 15a) Resolution No. 10 was revoked effective January 28, 1953 by Resolution No. 29, which appears as Appendix E hereto and, effective the same day, the Trustees adopted Resolution No. 30.[4] This resolution, *inter alia,* amended the length-of-service requirement to provide that the twenty years' service in the coal industry must have been earned in the twenty-five years immediately preceding the date of applica-

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[3] Pertinent portions of Resolution No. 10 are set forth in Appendix hereto, pages 14a-15a.

[4] Pertinent portions of Resolution No. 30 are set forth in Appendix hereto, pages 16a-17a.

tion. This requirement was immediately thereafter changed to allow the twenty years' service to be earned in the thirty years immediately preceding the date of application.[5]

The "twenty out of thirty" requirement has been in effect since 1953 for retirements prior to 1965, but the retirement age of 60 years was reduced to 55 years by Resolution No. 63 which was adopted on January 4, 1965. Resolution No. 63 was in effect at the time respondent filed his application for pension benefits in 1967.[6]

Each of the pertinent Resolutions provided that eligibility would be determined on the basis of the Resolution in effect at the time of application. The Trustees' authority to revise and amend their eligibility requirements has been repeatedly recognized by the court below. *Gaydosh* v. *Lewis,* 410 F. 2d 262 (C.A. D.C., 1969); *Roark* v. *Boyle,* 439 F. 2d 497 (C.A. D.C., 1970); and *Kosty* v. *Lewis,* 319 F. 2d 744 (C.A. D.C., 1963). In the last cited case at pages 748-749 the court said:

> "We do not deny the authority of the Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry."

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[5] Pertinent portions of Resolution No. 31 are set forth in Appendix hereto, page 17a.

[6] Pertinent portions of Resolution No. 63 are set forth in Appendix hereto, pages 18a-20a.

B. Facts of This Case

Respondent was born February 10, 1912, and he commenced working as a miner in the coal mining industry in either 1928 or 1929. He continued such employment and, by 1952, he was suffering from silicosis which resulted in his not working for various periods during the years 1952-1955 (App. 21a, 25a). During his illnesses his hospital and medical expenses, including rehabilitation expenses, were paid by the Fund pursuant to its hospital and medical benefits program.

In 1952, the respondent was 40 years old and he was not eligible for a retirement pension which at that time was granted only to persons 60 years of age or older. He did meet all the other eligibility requirements for retirement pension benefits which had been established by Resolution No. 10.

Respondent worked in the industry in 1953 and 1955 (App. 21a). Respondent's evidence showed that in 1953 he worked until August; in 1955 he worked from June until December (App. 23a, 25a, 21a); and in 1956 he worked for one quarter of the year (App. 21a). His work in the bituminous coal industry permanently ceased as of 1955 if Trustees' facts are accepted or 1956 if respondent's facts are accepted, a difference which is unimportant here.

In 1967, when respondent reached the age of 55 years, the age requirement for pension eligibility established in 1965 by Resolution No. 63, he submitted an application for a retirement pension to the Trustees, the application being received by the Fund on March 13, 1967 (App. 22a).[7] The Trustees denied respondent's appli-

[7] If the Resolution in effect in 1952 measures respondent's rights, then he would not be entitled to a pension until 1972 when he becomes 60 years of age, the age requirement then in effect.

cation on May 10, 1967 (App. 27a), pursuant to Resolution No. 63.

The reason for denial was that "[a]pplicant has not established proof of twenty (20) years' classified service in the coal industry within the thirty (30) year period immediately preceding the date his application was received at the Fund", namely, March 13, 1937 to March 13, 1967 (App. 27a). This requirement had been in effect since 1953, two years prior to the time respondent ceased working in the industry.

C. The Decisions Below

The District Court granted the Trustees' motion for summary judgment on the grounds that denial of respondent's application was required by Resolution No. 63, and the denial was based upon substantial evidence, and the denial was not arbitrary, capricious or in bad faith. Respondent's appeal urged only that he met the requirements of Resolution No. 63, and was not based on the contention that he was permanently disabled prior to 1953.

The Court of Appeals reversed the District Court and, in so doing, it rested its decision on a point that had not been raised, briefed or argued by either the respondent or the Trustees.[8] The court below, without citation of authority, overruled the Trustees' decision that the controlling eligibility requirements were those in effect at the time respondent reached retirement age, and held that respondent "had sufficiently

[8] Near the close of the Trustees' argument one member of the panel inquired as to nature of the length of service requirement in effect in 1952 and he was advised that any twenty years was sufficient at that time, after which a very brief discussion of the question occurred.

vested rights in 1952 which could not be cut off by the change in eligibility requirements in 1953". The Court of Appeals erroneously sought to justify its selection of 1952 saying that was when Lavella became permanently disabled and "was forced to quit work because of his advanced silicosis" (App. 3a). As discussed above, the record shows that respondent did not cease work in the industry until some time in 1955 or 1956.

In an attempt to do equity to the respondent, the Court of Appeals held that all applicants permanently disabled "by [an] occupational disease endemic to the mining industry" had vested pension rights if the applicant qualifies under the eligibility requrements in force when he became totally disabled, with the exception of age. The Court of Appeals seems to recognize the legal weakness of its conclusion since it said "our use of the term 'vested' in these circumstances is merely a shorthand way of describing this situation" (App. 5a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE LAW AND APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO WHEN PENSION RIGHTS VEST OR MATURE.

The decision below rested on the court's finding that respondent's eligibility for a pension was to be determined in accordance with the requirements in effect in 1952 since his rights, with the exception of age, became "vested" in that year. This holding directly conflicts with the Trustees' determination that entitlement to retirement pension benefits must be determined on the basis the applicant meets *all* the requirements

in effect at the time application is made. The Trustees have followed and applied this policy since they began administering the Fund. They submit that neither Section 302(c)(5) of the Labor Management Relations Act, 1947, the Trust Indenture contained in the National Bituminous Coal Wage Agreement of 1950, the Resolutions adopted pursuant thereto, nor judicial decisions authorize a finding that respondent's rights became vested in 1952. Accordingly, it is submitted that the Trustees did not act either erroneously or arbitrarily and capriciously and their adoption and application of Resolution No. 63 was a proper exercise of their discretion.

A. The Labor Management Relations Act Does Not Require Vesting.

Section 302 cannot be construed to require the vesting of retirement pension benefits before the applicant reaches retirement age. The failure of Section 302 (c) (5) to require vesting is attested by the efforts in Congress to propose legislation, on a prospective basis, to require some vesting of employee rights in Section 302(c)(5) trusts. Judge Leventhal discussed the question of vesting in the context of legislative history in *Roark* v. *Boyle,* 439 F. 2d 497 (C.A. D.C., 1970), a case which involved another requirement of the Fund. In concluding his discussion Judge Leventhal noted (p. 505):

> "None of the various proposals for a vesting requirement were enacted into law. The 1968 Hearings make clear that even those who supported a vesting requirement understood that existing law permitted the establishment and continuance of pension plans that did not provide for vesting, ..."

B. Neither the Settlors of the Fund Nor the Trustees Provided for or Authorized Vesting.

The settlors of the Fund specifically rejected the vesting principle in the Trust Indenture which, in part, states (App. 11a):

> "Title to all the monies paid into and/or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund . . . no benefits or monies payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void."

The Trustees always determined pension application on the basis of the regulations in effect when the application was received. Thus, Resolution No. 63, provided (App. 18a):

> "BE IT FURTHER RESOLVED, That effective February 1, 1965, the following regulations shall govern the payment of pensions * * * to employees of employers signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees."

The settlors did not act to change the authority of the Trustees, or to in any manner object to the Fund administration, or to provide for the vesting of pension benefits before complete eligibility. The failure of the settlors to act when amending the National Bituminous Coal Wage Agreement of 1950 in 1951, 1952, 1955, 1956, 1958, 1964 and 1966, or in the creation of

the National Bituminous Coal Wage Agreement of 1968, is conclusive of their satisfaction with Trustees' actions and the Trust administration.

C. The Impact of This Opinion Could Put the Fund in Financial Jeopardy.

The financial impact on the Fund cannot be measured precisely since the number of miners who have become permanently disabled for reasons endemic to the industry are not known to the Trustees. By viewing the experience under the Federal Coal Mine Health and Safety Act of 1969 [9] in the largest field of injury or disease endemic to the coal industry, black lung, the real, potential number of Fund pension claimants, could inundate the Fund.

If the estimated total of 260,000 black lung beneficiaries under the federal program by June of 1972 [9] is correct, and if only ten percent of those qualified under the *Lavella* doctrine for Fund pension benefits, the current number of Fund pensioners would increase by one-third to over 100,000.

Other classes of permanent disability endemic to the industry are also involved. Within seven days after the *Lavella* doctrine was pronounced the Trustees were sued by a miner who alleged that his application for the retirement pension was erroneously denied.[10] He alleged that in 1948 he was permanently disabled at age 47 in a mining accident and that at that time, he met all of the then existing requirements for eligibility except age. On May 11, 1971, another suit, styled as a

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[9] Daily Labor Report (BNA) No. 118, June 18, 1971, p. A-12.

[10] *Keene* v. *Boyle, et al.* (D.C. D.C.), C.A. No. 826-71, filed April 23, 1971.

class action,[11] was brought against the Trustees in reliance on the *Lavella* doctrine by another applicant for pension who had been denied and who had not worked in the industry since 1951, when he was totally disabled in a mine accident.

The court here has obviously attempted to do equity in the case of respondent without consideration of the problems, both financial and equitable, which face the Trustees. The Trustees are not without recognition of the ravages of the industry and have equal concern for individual equities of coal miners. However, operating under fiduciary duties and obligations the Trustees cannot afford the luxury of granting benefits in the case of individual equities. If this were so, they could and would be charged with breaching their fiduciary duty to treat *all* beneficiaries alike.

As another panel of the same court said in *Roark* v. *Lewis,* 401 F. 2d 425, 429, (C.A. D.C., 1968), "[t]he court is fully cognizant of the internal pressures exerted on the trustees: the size of the pie is fixed and variations can be achieved only by changing the size or the number of the slices." The Trustees, also aware of the "number of slices" available, did not provide for *disability* pensions for employees in the coal industry, but provided only *pension* benefits upon retirement after meeting certain eligibility qualifications. In effect, the court below exercised the discretion and authority of Trustees and awarded a disability pension. With limited funds, the Trustees of necessity must limit benefits within the authority and discretion granted to them by the settlors; and exercising this discretion the Trustees did not provide for disability

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[11] *Kaushep* v. *Boyle, et al.* (D.C. D.C.), C.A. No. 939-71, filed May 11, 1971.

pensions. This authority cannot be exercised by the courts, absent a showing of arbitrary and capricious action by the Trustees, and the court here found Trustees' action was not "per se arbitrary and capricious" (App. 4a).

In the most recent case, *Lee* v. *Nesbitt, et al., Trustees of the National Maritime Trust* [12] (C.A. 9th), No. 25973, decided June 11, 1971, not yet reported, the court dealing with a similar Section 302(c)(5) trust, held that where an employee met all qualifications for pension benefits except age, he could not be denied pension benefits because of a subsequent involuntary separation from covered employment required for qualification. The involuntary separation came about "because he [was] unable to obtain employment due to the temporary unavailability of jobs". If the *Lee* case is followed, the financial impact on the Fund will be even greater. There, any involuntary separation gave an applicant pension benefits if at the time of separation he met all qualifications except age. Here, the involuntary separation must be based upon permanent disability due to injury or disease endemic to the industry. In either case, the Fund might not be able to absorb the financial impact.

D. The Decision Below Is in Conflict With the Rationale of the Decisions of This Court, and There Is a Conflict in the Circuits as to When Pension Rights Vest.

In *United States* v. *Embassy Restaurant,* 359 U.S. 29 (1959), this Court held that an employer's royalty payments due and owing to a welfare fund were not wages "due to workmen" as defined in the Bankruptcy

[12] For the convenience of the Court the opinion is reproduced, Appendix pages 28a-32a.

Act. This Court found the *Embassy Restaurant* case controlling in the more recent case of *Board of Electrical Industry* v. *United States,* 391 U.S. 224 (1968), which denied a wage priority in bankruptcy to payments due a welfare fund. The Court said (p. 227):

> "The case before us concerns employer contributions to the welfare fund which are similarly not due the employees and never were; they were payable only to the trustees, who had the exclusive right to hold and manage the fund. Though the contributions were credited to individual employee accounts, *nothing was payable to employees except upon the occurrence of certain events.*" (emphasis supplied)

The rationale of these cases makes it clear that respondent did not have a vested interest in the Fund in 1952 because he had not fulfilled the eligibility requirements. In short, his rights had not fully matured and the Trustees could *validly* adopt amendments to the eligibility requirements even though they resulted in denial of respondent's pension application.

The vesting question has been considered by various courts of appeals. *Schneider* v. *McKesson & Robbins, Incorporated,* 254 F. 2d 827 (C.A. 2, 1958) involved a pension plan providing for retirement at age 65. The plan further provided that upon termination of employment relationship prior to qualification at age 65 " 'for any reason whatsoever * * * [the employees'] participation shall thereupon terminate' " (p. 828). The court sustained denial of benefits to three discharged employees holding (p. 829):

> "Under the express terms of the plan the fund exists for the sole benefit of participants and retired participants. As the appellants had not at-

> tained age 65 at the time they were discharged, or had not reached age 60 so as to be eligible for retirement by special vote of the board of directors, they cannot claim an interest in the fund as if they were 'retired participants.' *Nor will they, upon attaining age 65, be entitled to a pension. Under the plan pensions are payable only to participants. The appellants ceased to be participants when they were discharged.*" (emphasis supplied)

The same result was reached by the Third Circuit in *Sparta* v. *Lawrence Warehouse Company,* 368 F. 2d 227 (C.A. 3, 1966); the Sixth Circuit in *Finnell* v. *Cramet, Inc.,* 289 F. 2d 409 (C.A. 6, 1961) and *Smith* v. *Union Carbide Corporation;* 350 F.2d 258 (C.A. 6, 1965); and by the Seventh Circuit in *Local Lodge 2040, Internat'l Ass'n of Mach.* v. *Servel, Inc.,* 268 F.2d 692 (C.A. 7, 1959), where the court was concerned with employees who were laid off involuntarily. The Seventh Circuit held (p. 699):

> "[T]hat no employee of the class represented by the individual plaintiffs was eligible for pension benefits under Servel's pension plan because each such person was discharged prior to his sixty-fifth birthday; * * *."

Similarly, *Finnell* v. *Cramet, Inc., supra,* involved a pension plan providing "No Employee prior to his retirement [at age 65] under conditions of eligibility for pension benefits under this Plan shall have any right or interest whatsoever in" the plan. Though the employees were discharged rather than leaving voluntarily, the court denied them plan benefits, stating (p. 413):

> "We think that under the foregoing provisions of the Pension Plan and under the applicable Il-

linois Law, *the appellants, having not yet qualified for a pension of any kind, had no vested rights in the pension fund.* * * *

"Appellants' so-called *rights* in the pension fund were actually not rights *at all, but were in the nature of expectancies, and as such were subject to the terms of the instrument under which they arose.*" (emphasis supplied)

As noted above, the Ninth Circuit's *Lee* case, supra, goes further than *Lavella* and holds that pension benefits vest in any involuntary separation, not only one resulting from permanent disability due to injury or disease endemic to the industry. Therefore, a direct conflict arises between the *Lee* case and the 2nd, 6th and 7th Circuit cases cited herein. This is in addition to the conflict here.

There is a conflict between the circuits as to when, and if, pension rights vest prior to an employee meeting all qualifications, including age, which must be resolved to insure the proper and orderly administration of the ever increasing number of pension trusts. The resolution of this question is of critical concern to both the beneficiaries and to the Trustees who are charged with the Trust administration and the distribution of the benefits.

E. The Question of Federal Law Raised by the Opinion Below Is Important and Continuing in the Administration of This and Other 302(c)(5) Trusts.

The *Lavella* vesting doctrine emphasizes that respondent's ceasing work was involuntary and the result of a disease "endemic" to the coal mining industry. This holding will create discrimination. For the first time there will be a class of beneficiaries with vested rights who, while not having to work, are entitled

to a retirement pension when they reach retirement age. Is the critical factor in the decision below involuntariness or a disabling "endemic" disease. If it is the former, then an employee discharged or laid off for cause or because of economic conditions would have vested rights if at the time he was laid off he qualified in all other respects. This would appear to be the rule in the Ninth Circuit's *Lee* case, supra. If it is the latter, the question arises of what illness is, or is not, "endemic" to the industry? Arthritis, lower back strain, heart attacks, can all be said to be "endemic", in that they can be caused by work in constant dampness, constant stooping and lifting, and constant extreme physical exertion. Considering the nature of the employment, cannot most illnesses of miners be said to be "endemic to the industry"? What clear cut standard has been left for Trustees and the lower courts to apply? Moreover, what rule should be applied to miners who involuntarily ceased working because of illness or injury resulting from non-mining connected illnesses or injuries?

In each of the foregoing situations a class of potential future beneficiaries with vested rights would be created. The Trustees could not know their number until years later and it would be impossible for the Trustees to engage in prudent financial planning.

Perhaps the lower court foresaw some of these difficulties and tried to limit its holding to the "individual facts of appellant's case". No such principle can be so circumscribed! This Court should establish a body of federal law concerning trust funds created in conformity with the Labor Management Relations Act, 1947. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). There the Trustees sued an employer for

failure to pay royalties. In its decision this Court described its function under Section 301 as follows (p. 470):

> "Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. Textile Workers Union v. Lincoln Mills, 353 US 448, 1 L ed 2d 972, 77 S Ct 912."

The rationale of the *Benedict* case should be followed here, and this Court should decide this important question of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,293

THOMAS LAVELLA, *Appellant*

v.

W. A. BOYLE, ET AL

Appeal from the United States District Court
for the District of Columbia

Decided April 16, 1971

Mr. Robert C. Handwerk for appellant.

Mr. Harold H. Bacon, with whom *Messrs. Welly K. Hopkins* and *Joseph T. McFadden* were on the brief, for appellees.

Before WRIGHT, MACKINNON and WILKEY, *Circuit Judges.*

PER CURIAM: This is an appeal from the District Court grant of a summary judgment for the appellee Trustees of the United Mine Workers of America Welfare and Retirement Fund (1950).[1] Appellant is a retired coal miner who filed an application for pension fund benefits 13 March 1967. The Trustees denied the application on the ground that "appellant has not established proof of twenty (20) years' classified service in the coal industry within the thirty (30) year period immediately preceding the date his application was received," specifically, 13 March 1937 to 13 March 1967. The material and relevant facts do not appear to be in dispute, and the District Court therefore by summary judgment sustained the action of the Trustees. For reasons set forth hereafter, we reverse and remand for trial.

[1] The fund was created by the National Bituminus Coal Wage Agreement of 1950, as authorized by 29 U.S.C. § 186(c)(5) (1964).

The chronology of appellant's service in the coal mining industry is determinative of his rights here. Appellant, born 10 February 1912, worked for the Shawmut Mining Company or its successor from either August 1928 or August 1929 until 1952, by which time he had contracted such an advanced case of silicosis, the miner's disease commonly referred to as black lung, that he was permanently disabled. He did work part of the year 1953 in the mining industry on so-called "dead work," not inside the mines. He was hospitalized and received treatment which apparently benefited him, as he returned to work for a short period in 1955. By 10 February 1967 he met the age requirement for pension of 55 years and applied shortly thereafter.

Eligibility for pension fund benefits have been set from time to time by resolutions of the Trustees, beginning 5 April 1950. At the time appellant filed his application for fund benefits one of the relevant eligibility requirements read:

> Completed twenty (20) years' service in the coal industry as described in paragraph II A hereof, in the United States, within the thirty (30) years' period immediately preceding the date his application for pension is received at the office of the Trust Fund.

Pursuant to this criterion of eligibility, the pension fund Trustees calculated appellant's service as beginning 13 March 1937, giving him a solid base of unquestioned service through the year 1951, a total of 15 years. To this the the Trustees added the maximum credit allowable of four years, during which appellant Lavella received workmen's compensation. To this unquestioned 19 years the Trustees added a one-quarter year credit for the years 1952 and 1953, thus giving him a total of 19½ years' service credit in the 30-year period immediately preceding the receipt of his application. By the Trustees' calculation appellant thus fell short by one-half year.

By appellant's own calculation he had 20¼ years, picking up an additional ¼ year in 1953, in 1955, and possibly in 1956. There is no Social Security or other record of his having received wages in 1956, but in 1953 he did receive $16.66 in wages and in 1955 he received more than the sum calculated as one quarter's pay, but one quarter's credit was all that was allowed by the Trustees. However, we do not base our decision on the additional credit of the two quarters in 1953 and 1955, which would give appellant the full 20 years, but on his status in 1952 when he was forced to quit work because of his advanced silicosis. Lavella never worked anywhere except in the mining industry.

While the eligibility provision in 1967 was as quoted above, the proviso "within the thirty (30) years' period immediately preceding the date his application for pension is received" was only added in 1953. Therefore, prior to 1953, 20 years' service *at any time* would qualify an applicant for a pension. When appellant was permanently disabled by the black lung and unable to work after some time in 1952 (the undisputed record shows he worked one-fourth year and received workmen's compensation for three quarters of the year), appellant had completed between 23 and 24 years' service consecutively in the mining industry for the same company. He had thus completed all of the requirements for a pension except attainment of the age, then age 60, later reduced to 55.

Appellant did not leave the mining industry and work elsewhere, nor did he willingly retire to idleness. He was incapacitated from further work in the mining industry by that disease peculiarly attributable to the conditions under which he worked in the mines, *i.e.*, silicosis or black lung. In February 1954 he underwent a right middle lobectomy because of atelectasis of the right middle lobe, following which he had repeated attacks of respiratory infection with several episodes of bronchial pneumonia and pneumonitis.

He was declared disabled and eligible for pension under the Occupational Disease Act of Pennsylvania.

Under these circumstances, while we do not hold that the Trustees' action in 1953 in changing the eligibility standards to require that the 20 years' service in the coal industry must be within the 30-year period immediately preceding the date of application for pension was *per se* arbitrary or unreasonable;[2] nor do we decide its effect on those miners who had not completed 20 years' service by the date of this change in 1953, we hold here that a coal industry employee in the situation of appellant Lavella, who had accrued his 20 years' service prior to the imposition of this additional requirement, and whose failure to work the additional years prior to the age date of eligibility for his pension was due to permanent disability caused by the occupational disease endemic to the mining industry, had sufficiently vested rights in 1952 which could not be cut off by the change in eligibility requirements in 1953.[3]

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[2] *See Roark* v. *Lewis*, 130 U.S.App.D.C. 360, 362, 401 F.2d 425, 427 (1968), where we held that the trustees' *interpretation* of a particular pension eligibility requirement was not arbitrary or capricious but remanded for the development of a record on the reasonableness of the requirement itself. Conversely, in the instant case, we find no fault with the eligibility requirement here involved, but view as unreasonable its application to the individual facts of appellant's case.

[3] We recognize that in *Kosty* v. *Lewis*, 115 U.S.App.D.C. 343, 347, 319 F.2d 744, 748 (1963), we declined to analyze a similar claim in terms of whether "vested" rights were involved. In *Kosty* the issue was whether the changed pension requirements could be invoked to cut of the rights of a pension of a miner who met all prior criteria for a pension except actual retirement from employment at the time the policy was changed. We stated there that:

> our interest . . . is directed to the reasonableness of the opportunity afforded to mature pension eligibility under current standards where all that is lacking is the actual termi-

We have carefully considered our recent decision in *Gaydosh* v. *Lewis* [4] and do not find it determinative of the respective rights of appellant and Trustees here. We found Gaydosh's claim to a pension suffered from two defects: (1) He had not worked in the coal industry for a four-year period from 1943 to 1947. The resolution of the Trustees changing the eligibility requirement to include service immediately preceding 29 May 1946 was not arbitrary and unreasonable and did not destroy any rights vested in Gaydosh at that time. (2) Gaydosh *retired voluntarily* at the age of 56. Gaydosh was in a position to continue work, and had he done so, when the eligibility requirements were later changed, he would subsequently have become eligible for a pension. Lavella had no choice; at the time the change which affected him was made, he was permanently disabled by miner's black lung. We pointed out in *Gaydosh* that "economic reality requires a reasonable cutoff date as to age lest the fund be exhausted by comparatively premature retirement. Pragmatically speaking, when a miner retires at the age of 56 and seeks to await the tolling of four years before filing for a pension, those years are productively carried by the sweat of the other miners. . . . [T]he absence of Gaydosh must mean a pro-

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nation of employment, rather than debating whether such eligibility should be regarded in substance as already having been matured.

In the instant case, as we point out *infra*, appellant's opportunity to "mature" his pension eligibility, *i.e.*, to apply for and receive a pension upon reaching the required age, was unreasonably denied by the application of the new policy to his case, since he had met all the then extant requirements for a pension except age, and he was prevented by his physical condition from continuing to work in order to fulfill the additional condition for pension eligibility imposed by the changed policy. Our use of the term "vested" in these circumstances is merely a shorthand way of describing this situation.

[4] 133 U.S.App.D.C. 274, 410 F.2d 262 (1969).

portionate decrease in the worth of the fund."[5] Not so with appellant in the case at bar, who had completed all of his eligibility requirements before the change in the pension regulations to require service within 30 years immediately preceding retirement. And the appellant here did not voluntarily retire from the coal industry and await his attainment of age; he was permanently disabled by the disease endemic to this industry.

Had the appellant made a motion for summary judgment on the undisputed facts in the trial court, we would be in position to decide this case finally on this appeal. However, since appellant has not yet made a motion for summary judgment, we hereby reverse the grant of summary judgment for appellees and remand the cause for trial in the District Court.

So ordered.

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[5] *Id.*, at 277, 410 F.2d, at 265.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

NATHAN J. PAULSON
CLERK

May 12, 1971

No. 24,293—*Thomas Lavella* v. *W.A. Boyle, et al*

Welly K. Hopkins, Esq.
Harold H. Bacon, Esq.
Joseph T. McFadden
907 15th Street, N.W.
Washington, D. C. 20005

Dear Gentlemen:

This is to inform you that your suggestion for rehearing *en banc* was transmitted to the full court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

Nathan J. Paulson
NATHAN J. PAULSON
Clerk

NJP/bja
cc: Robert C. Handwerk, Esq.

29 § 186—Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations

expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees whose are employed in an industry affecting commerce;

* * * * * * * * * * *

(c) The provisions of this section shall not be applicable

* * * * * * * * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950
EFFECTIVE MARCH 5, 1950, TO JUNE 30, 1952
EXECUTED AT WASHINGTON, D. C., MARCH 5, 1950

* * * * * * * * * * *

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such

Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302(c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of

this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N.W., Washington, D. C., or as otherwise designated by the Trustees.

It is stipulated and agreed by the contracting parties hereto that an annual audit of the Fund hereinabove described shall be made by competent authorities to be designated by the Trustees of said Fund. A statement of the results of such audit shall be made available for inspection of interested persons at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

Failure of any Operator signatory hereto to make full and prompt payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" in the manner and on the dates herein provided shall, at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Operator during the life of this Agreement and it shall be deemed a violation of this Agreement if any

mine to which this Agreement is applicable shall be sold, leased, sub-leased, assigned, or otherwise disposed of for the purpose of avoiding the obligation hereunder.

Action which may be required hereunder by the Operators for the appointment of a successor Trustee representing them, or which may be required in connection with any other matter hereunder, may be taken by those Operators who at the time are parties hereto, and authorization, approval, or ratification of Operators representing fifty-one percent (51%) or more of the coal produced for use or sale during the calendar year previous to that in which the action is taken shall be sufficient and shall bind all Operators.

B. It is hereby stipulated and agreed by the contracting parties with respect to the Fund created by the National Bituminous Coal Wage Agreement of 1947:

(1) The Operators signatory hereto agree to make payments into said Fund on or before March 15, 1950, on account of all coal produced for use or sale up to and including March 6, 1950, with respect to which payment has not heretofore been made, such payments to be on the basis heretofore made by said Operators under the National Bituminous Coal Wage Agreement of 1947 and the National Bituminous Coal Wage Agreement of 1948, whichever is applicable.

(2) The Operators signatory hereto hereby renounce and forever release any and all claim to or interest in payments made into the said 1947 fund.

(3) The Trustees appointed pursuant to this Agreement are hereby authorized and directed to accept into the new trust fund hereby created and to devote for the purposes hereinabove specified and enumerated, any and all trust funds remaining unexpended or unobligated in said 1947 trust fund.

(4) The parties hereto agree that the best interest of the beneficiaries of said trust fund would be served

by having all unexpended or unobligated funds therein transferred as above provided, and agree that the Trustees thereof should transfer such funds to the new trust fund created by this Agreement.

C. It is stipulated, understood and agreed by the contracting parties hereto that the present practices with respect to wage deductions and their use for provision of medical, hospital and related services shall continue during the terms of this contract or until such earlier date or dates as may be agreed upon by the United Mine Workers of America and any Operator signatory hereto.

D. It is the intent and purpose of the contracting parties hereto that full cooperation shall by each of them be given to each other, the Trustees named under this Section and to all affected Mine Workers to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of this Fund.

Second Meeting of the Trustees, United Mine Workers of America Welfare and Retirement Fund of 1950, April 5, 1950

RESOLUTION No. 10

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

* * *

BE IT FURTHER RESOLVED, that the following regulations shall govern the payment of pensions of ONE HUNDRED DOLLARS ($100.00) per month to individual members of the United Mine Workers of America, and to employees of the

coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he meets the following requirements:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.

C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.

D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada; a year of service being one in which applicant has for more than six months in any calendar year:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

Any applicant who meets all requirements of eligibility at any time after May 28, 1946, shall not be subsequently disqualified by returning to work in the Coal Industry for a period of less than one year.

21st Meeting 1-28-'53

RESOLUTION No. 30

PENSION

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

* * *

BE IT FURTHER RESOLVED, that effective January 29, 1953 the following regulations shall govern the payment of pensions of United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he has:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Completed twenty (20) years service in the coal industry in the United States, its possessions or territories, or the Dominion of Canada within the twenty-five (25) year period immediately preceding his application for pension; a year of service being one for which the applicant has:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry

and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following a period of regular employment in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension only upon the completion of twenty (20) years service in the Bituminous Coal Industry, and meets the other requirements of eligibility as contained in Paragraphs A and B and its sub-sections, subsequent to May 28, 1946.

* * *

22nd Meeting 3/13/'53

RESOLUTION No. 31

PENSION

BE IT RESOLVED, That the words and figures "twenty-five (25)" appearing in the fourth line of Paragraph I B of Resolution No. 30 be stricken and in lieu thereof the words and figures "thirty (30)" be inserted, to be effective as of January 29, 1953.

BE IT FURTHER RESOLVED, That Resolution No. 30 in all other respects remains unchanged and is in full force and effect.

Seventy-Eighth Meeting of the Board of Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, January 4, 1965

RESOLUTION No. 63

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to employees of coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from such agreement; and

* * *

WHEREAS, the Trustees desire to increase the amount of pensions heretofore paid from seventy-five dollars ($75.00) per month to eighty-five dollars ($85.00) per month, to reduce the age for pension eligibility from sixty (60) years of age to fifty-five (55) years of age effective February 1, 1965, and to permit miners who are employed in the coal industry on or after February 1, 1965, to receive credit for coal industry service for any twenty (20) years of coal industry employment prior to the date of application for pension;

* * *

BE IT FURTHER RESOLVED, That effective February 1, 1965, the following regulations shall govern the payment of pensions of eighty-five dollars ($85.00) per month to employees of employers signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

A. An applicant who subsequent to February 1, 1965, permanently ceases work in the bituminous coal industry as an employee of an employer signatory to the National Bituminous Coal Wage Agreement

of 1950, as amended, shall be eligible for a pension if he has:

1. Attained the age of fifty-five (55) years or over at the date of his application for pension.

2. Completed twenty (20) years' service in the coal industry in the United States, as described in paragraph II A hereof.

3. Permanently ceased work in the coal industry immediately following regular employment for a period of at least one (1) full year as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, as defined in paragraphs II B hereof.

B. An applicant who, prior to February 1, 1965, had permanently ceased work in the bituminous coal industry, as an employee of an employer signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, shall be eligible for a pension if he has:

1. Attained the age of fifty-five (55) years or over at the date of his application for pension.

2. Completed twenty (20) years' service in the coal industry as described in paragraph II A hereof, in the United States, within the thirty (30) years' period immediately preceding the date his application for pension is received at the office of the Trust Fund.

3. Permanently ceased work in the bituminous coal industry after May 28, 1946, following regular employment as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, and having been regularly employed in a classified job in the coal industry immediately preceding May 29, 1946.

C. An application who could have qualified for a pension under paragraph I B hereof, had he not worked beyond February 1, 1965, or an applicant who at any time after February 1, 1965, could have permanently ceased work and qualified for a pension under paragraph I A hereof, at age fifty-five (55) or over but continued to work in the coal industry, shall not be required to work one (1) full year immediately preceding permanent cessation of work so long as his only subsequent employment in the coal industry is as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement.

• • •

Year	Claimed	Required Earnings	SSA Earning in coal Industry	Cr. possible per SSA	Service Certified By: Co. Stat.	Service Certified By: 14-P	Service Certified By: Other	Credit Established	Miscellaneous Information — Why No Credit & Etc.
									20/30 Years - 3/13/37 To 3/13/67
1937	1	567	1300 +	1		2-P		1	
1938	1	486	1100 +	1		2-P		1	
1939	1	534	1400 +	1		2-P		1	
1940	1	606	1980 +	1		2-P		1	
1941	1	729	1800 +	1		2-P		1	
1942	1	861	2000 +	1		2-P		1	
1943	1	1,002	729.79 C	3/4		2-P		1	In Military Service OK for Full Credit
1944	1	1,182	965.55 C	3/4		2-P		1	7-23-43 To 2-28-44
1945	1	1,257	2100 +	1		2-P		1	
1946	1	1,191	2200 +	1		2-P		1	
1947	1	1,457	1800 +	1		2-P		1	
1948	1	1,470	2400 +	1		2-P		1	
1949	1	1,103	1900 +	1		2-P		1	
1950	1	1,338	2500 +	1		2-P		1	
1951	1	1,646	1700 +	1		2-P		1	
1952	1	1,565	361.69 C	1/4		2-P		1	
1953	1	1,743	16.66 C	0		2-P		1	Credit For W/C Award - 4 Years Maximum Credit
1954	0	1,661	—	0				1	
1955		1,958	616.36 C	1/4				1	
1956		2,145	—	0				1/2	
1957		2,238	—	0				0	
1958		2,185	—	0				0	
1959		2,261	—	0				0	
1960		2,316	—	0				0	
1961		2,340	—	0				0	
1962		2,413	—	0				0	
1963		2,486	—	0				0	
1964		2,813	—	0				0	
1965		2,835	—	0				0	
1966		2,957	—	0				0	
1967	0	2,984	—	0				0	
1968	—			—				—	Maximum Credit Given -
1969	—			—				—	Based On Information And
1970									Evidence In File.

C Exact Earnings For SSA

Total 17 + W/C - 4 Year Maximum Credit Possible

Total 15

Total 19 1/2

19 1/2
Total Certified

P-10 (Rev.2-27-69)

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND
907 FIFTEENTH STREET, N. W. WASHINGTON, D. C. 20005

Application for Pension

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

QUESTIONS MUST BE ANSWERED—FAILURE TO DO SO WILL DELAY PROCESSING

1. District 2 Local Union No. 2324 Date 2-15-1967

2. Name (Print) THOMAS (First) A (Middle) LAVELLA (Last)

3. Social Security Number 1 2 2 0 5 2 1 8 7

4. Address (Street and Number) KERSEY (City) PENNA-15 (State)

5. Date of Birth 10 (Month) 11 (Day) 1912 (Year) Place of Birth KERSEY

Proof of age must be attached to this application. See attached information sheet for type of proof required.

6. Name of Father ANTHONY (First) LAVELLA (Last) Place of Birth Italy

7. Name of Mother ESTHER CARRABBE (First) (Maiden) Last Place of Birth Italy

8. Name of Wife, if living (First) (Middle) (Last) Age

9. Number of Children under 18 years of age

10. Have you permanently ceased working in the coal industry? ☑ Yes ☐ No

If you have not permanently ceased working, your application will be processed, but if you are found eligible, pension payments cannot begin until you submit to the Fund a Certificate of Retirement form which will be mailed you.

11. Name of last employer in the coal industry SHAWMUT MINING CO. (List your present employer if you are currently working)

Date you began working for this company Aug 1929 Date you last worked [illegible]

Type Work MINER

Reason for Retiring Sick

12. Did you ever receive an award for Workmen's Compensation because of a mine injury or silicosis?

☑ Yes ☐ No

If "Yes", a copy of the award should be submitted with this application if you wish credit.

Form 24-P (Rev. 2-1-65)

WHEN FILLED OUT PLEASE SEND YELLOW AND WHITE COPIES TO U.M.W.A. DISTRICT OFFICE

BEST AVAILABLE COPY.

13.

EMPLOYMENT RECORD.

List below all your employment in the coal industry, starting with the company you first worked for.

If you served in the Armed Forces during a war or national emergency and wish credit for this period, list the branch of service and the dates served. Also attach a copy of your Discharge.

From Mo.	From Yr.	To Mo.	To Yr.	Name of Coal Company	Location of Coal Company Town	Location of Coal Company State	Mine No.	Local Union No.	Type Work
Sep	1932	Aug	1933	Stearns Mining Co.	Brampton	Ky	5	2227	Miner

14. Were you ever connected with the management or operation of any of the coal companies where you have been employed or did you ever have any financial interest in any company?

Yes ____ No ____

15. If "Yes", indicate below the name of the company or companies and the period involved.

NAME OF COMPANY	FROM (month, year)	TO (month, year)

CERTIFICATION BY APPLICANT

Any person, who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

_____ *(Witness)*

_____ *(Witness)*

I certify that the statements made by me in this application are true and correct and that I have listed all of my employment in the coal industry.

Applicant sign here [signature] *DO NOT print or stamp*

CERTIFICATE OF LOCAL UNION

This is to certify that the above applicant is currently a member of Local Union No. 2179 and has been a member of this Local Union since ____ / ____ / 1952
Month *Day* *Year*

LOCAL UNION SEAL

[signature] 2-16-62
Signature of L. U. Officer *Date*

[signature] 2-27-62
Signature of L. U. Officer *Date*

CERTIFICATE OF DISTRICT

This is to certify that applicant is a member of District No. ____, United Mine Workers of America

_____ _____
Date *Authorized District Signature*

T AVAILABLE COPY

SUPPLEMENTAL EMPLOYMENT RECORD

Quarters Ending		Employer	I.D. No.	Kind of Work
From	To			
3/55	12/55	New Shawmut Mining Co.	2279	Car Dropper
6/55	9/55	Perry & Van Slander Coal Co.	2279	Car Dropper

NOTE: Letter and Statement on Form N.SM.-EE 2000 6-59 D.P. from New Shawmut Mining Company, St. Marys, Pa., herewith enclosed explains item one above.

As to Perry & VanSlander Coal Co. - they are no longer in existence, however, an employee of their's with whom I worked at the time I was employed by this Company is still living and his name and address is:

Mr. Fred Swanson,
Dagus Mines,
Elk County, Pa. 15831

If you deem it necessary I can obtain an affidavit from him verifying my employment with Perry & VanSlander Coal Company.

AS TO any employment with New Shawmut Mining Company in 1954 - I always was an employee of this Company but during this period I was ill therefore the reason that no wages were reported by this Company for me during this period. The reason I did not report and failed to claim the above two Companies during 1955 on my Pension Application - I felt I had sufficient time to warrant my application without the need of 1955.

File No. 1h0219

A39

SIGNATURE [redacted]

Dated May 2, 1967
Kersey, Pa. 15846.

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington, D. C. 20005

File No. 140219
Name LAVELLA, Thomas
District No. 2
Local Union No. 2279

Denial of Pension.

The application of Thomas Lavella
Address Kersey, Pennsylvania 15846

Is hereby denied for the following reason:

Applicant has not established proof of twenty (20) years' classified service in the coal industry within the thirty (30) year period immediately preceding the date his application was recived at the Fund—March 14, 1937 to March 13, 1967.

Applicant claims no employment in the coal industry during 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967; no credit can be given for these years. Based on evidence in Trust Fund files, applicant did not work regularly in the coal industry during 1943, 1944; only part credit was given for these years.

It is noted applicant was authorized Workmen's Compensation Benefits as a result of a silicosis award. Pursuant to Trustee regulations, he has been given the maximum credit of four years for the Workmen's Compensation Award he received. However, it is not sufficient to establish that he meets the requirement set forth above.

Date: May 10, 1967

DLM: ISR:ppm

By /s/ DONALD L. MCFARLAND
Review Unit, Pension Benefits

(Filed June 11, 1971)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25973

HANDEE T. LEE, *Plaintiff-Appellee,*

v.

ROBERT NESBITT, JAMES J. MARTIN, JOSEPH CURRAN, and all others who are Trustees of the National Maritime Trust, *Defendants-Appellants.*

Appeal from the United States District Court for the Western District of Washington Northern Division

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

KOELSCH, Circuit Judge.

Lee commenced this action in the District Court against the Trustees of the National Maritime Union Pension Trust, seeking a judgment declaring invalid one of the rules prescribing eligibility requirements for a retirement pension, specifically the "break-in-employment" rule (hereinafter "the rule"), and further declaring him to be entitled to a pension. Federal jurisdiction was based on the diversity of citizenship of the parties. *Dersch* v. *United Mine Workers Welfare and Retirement Fund,* 309 F. Supp. 395 (S.D. Ind. 1969). Both parties made motions for summary judgment, the Court granted Lee's and this appeal followed.

The National Maritime Union Pension Trust (hereinafter "the Trust") was established by the National Maritime Union in 1953, pursuant to § 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)(1964)), to provide pensions for the benefit of unlicensed seamen members. As required by that section, the Trust is administered by an equal number of employer and employee representatives, as trustees, for the benefit of those seamen whose employers contribute to

the Trust fund. Under the Trust provisions, the trustees are vested with discretion to establish requirements governing eligibility for benefits and to determine questions of eligibility.

In 1967, when Lee applied for a pension, a seaman, to be eligible, was required to be at least 60 years of age and to have worked a minimum of 15 years in covered employment —defined as employment with a contributing employer. However, the rule, in effect, added a further requirement concerning continuity of employment; it provided: "If a person does not work in Covered Employment for at least 200 days in any period of three consecutive calendar years after January 1, 1953, it shall constitute a break in employment and his previous pension credits shall be cancelled."[1] The trustees denied the application on the ground that Lee had suffered a break in employment in the period 1955-1957; they also declared he had forfeited all his credits prior to 1957.[2]

In the district court Lee conceded that he had not worked 200 days during the period 1955-57 and indeed his affidavits showed that he had worked 81 days in 1955 and 106 days in 1957, but not at all in 1956. Thus during the period he had worked a total of only 187 days or 13 short of the required 200. However, he excused the deficiency by the further assertion that no employment was available in 1956 and that the break was involuntary. He took the position that the rule was unreasonable on its face because of the absence of a proviso staying its operation whenever employment was unavailable; in the alternative he urged that the trus-

[1] The rule has since been changed to require at least 300 days of employment during three year periods.

[2] Lee had credit for 17½ years of covered employment before 1955 but on that date he had been ineligible to retire because of lack of age; although he had worked continually after 1957, he had accumulated only 8¼ years of new credits before he reached the age of 65.

tees acted arbitrarily when they refused to imply such a proviso and denied him a pension. The district court held the rule to be reasonable, but the trustees' interpretation of it to be arbitrary.

Section 302 requires that a pension trust be "for the sole and exclusive benefit of employees." The trustees of such a trust, while possessing a large measure of discretion in prescribing conditions of eligibility for benefits, owe a fiduciary duty to the employees and may neither impose unreasonable conditions of eligibility nor act arbitrarily in determining who is eligible. *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir. 1968), *adhered to sub nom. Roark* v. *Boyle,* — F.2d — (D.C. Cir. 1970). Lee does not question the reasonableness of the rule so far as it eliminates from pension coverage those seamen-employees who voluntarily choose not to maintain a continuity of employment. But he contends that the rule is unreasonable on its face because it also operates whenever a break is involuntary. This contention is too far reaching. Since the trust is solely funded by employers' contributions, the amounts of which are determined by the number of days an employee works in covered employment, denial of benefits can reasonably be rested upon an insufficiency of years of employment regardless of the reason. Thus, even if an employee, through no fault of his own, is prevented from completing a minimum period of employment, he may be denied a pension. *Stasukonis* v. *Kennedy,* 387 Pa. 216, 127 A.2d 678 (1956).

However, that is not this case. Here the trustees presumptively calculated that the 15 year work period would produce sufficient employer contributions to fund an employee's pension. Lee had worked in excess of that length of time without interruption. He was then entitled to a pension save for the fact that he had not yet reached retirement age. But if, before reaching that age, he was unable to thereafter find sufficient work, despite reasonable efforts, the rule would prevent him from ever receiving those benefits. We conclude that the rule, to the extent that it pro-

hibits benefits to an employee solely because of an involuntary interruption in employment after the completion of his minimum employment requirement and before reaching retirement age, is unreasonable on its face.

Our consideration of the matter cannot end here, however, for the trustees have advanced arguments which they assert justify the rule. In particular, they argue that the purposes of the trust compel this seeming unfairness. Pointing out that the American Merchant Marine is an industry of fluctuating but declining employment opportunities, the trustees argue, in effect, that the rule is calculated to induce competent employees to remain in the industry; to that end, pension benefits are limited to those who can always keep their jobs. We agree that these purposes justify the operation of the rule when an involuntary break in employment occurs before the employee has accumulated credit for 15 years of employment, but again, that is not this case. The employee who, prior to an involuntary interruption in his employment with contributing employers, has worked in the industry for 15 years, has surely demonstrated his work ability. Merely because he is unable to obtain employment due to the temporary unavailability of jobs does not establish that his services are no longer available to or needed in the industry. The operation of the rule in cases such as this one tends to thwart the trustees' stated purposes and, in fact, offers qualified seamen no incentive to stay in the industry.[3]

In sum, we conclude that the rule is unreasonable and hence invalid to the extent that it requires forfeiture of

---

[3] Contrary to appellants' assertion, § 302 trust agreements generally differentiate between voluntary and involuntary breaks in employment insofar as the effects on accumulated credits for prior services are concerned. When the break is due to lack of jobs, credits are preserved; but they are lost when the employee quits. Multi-employer Pension Plans Under Collective Bargaining, Dept. of Labor, Lab. Bulletin No. 1362, p. 69 .(1960). See Zining v. Retirement Fund of Fur Mfg. Industry, 42 Lab. Cas. 17012 (N.Y.S. Ct. 1961).

employment credits in the case of an employee who has accumulated the minimum number of credits to entitle him to a pension and then, due to unavailability of covered employment, suffers a break in employment during the interval remaining before his retirement.[4]

As to Lee, however, there remain issues of fact to be resolved before a judgment can be rendered. The district court, on the basis of Lee's affidavit that he was unable to secure any covered employment in 1956, concluded that Lee was prevented from working at least 200 days during the whole period 1955-1957. Obviously this conclusion is erroneous.[5] We must therefore return the matter to the district court where the issue can be resolved. On Lee will rest the burden of proof.

The judgment is vacated and the matter is remanded to the district court for further proceedings consistent with this opinion.

---

[4] Having so concluded it is unnecessary to determine whether the trustees' actions were or were not arbitrary.

[5] Fed. Rules Civ. Proc., Rule 56(d) provides that the district court on motion for summary judgment may by order declare settled specific facts that "appear without substantial controversy." However, the record here does not indicate a lack of controversy with respect to work availability in any of the three years, nor does the court's opinion reveal an intention to make such a determination.

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IN THE

Supreme Court of the United States

No. 71-13

W. A. BOYLE, C. W. DAVIS, AND JOSEPHINE ROCHE, TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,

Petitioners,

v.

THOMAS LAVELLA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT IN OPPOSITION

Robert C. Handwerk
Southern Building
Washington, D.C. 20005
Counsel for Respondent

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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IN THE

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THOMAS LAVELLA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The respondent has no objection to the statement of the question presented by petitioners except the last portion thereof which states: "* * * when under admitted trust authority neither Section 302(c)(5), nor the Trust Indenture provides for or required such vesting?" (Pet., p. 2). Respondent has not admitted such authority, and no such authority exists.

STATEMENT OF THE CASE

The petitioners, W. A. Boyle and Josephine Roche, were removed as trustees of the pension fund by the U.S. District Court for the District of Columbia in case entitled, *Blankenship, et al v. Boyle, et al*, C.A. No. 2186-69, effective July 15, 1971, for violation of duties as trustees. On June 14, 1971, this Court refused Boyle a stay. The co-trustee, Josephine Roche, resigned as trustee on July 1, 1971. The trust indenture (App. to Pet. at pp. 8a to 9a), provides that "there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale." It does not state that such payment shall be made on the per ton of coal that the *operator produced*, (italics ours). In 1956 the petitioners sent respondent to Gaylord Farms, Wallingford, Connecticut, for treatment and rehabilitation, but he was not cured and continued to suffer from black lung disease. However, petitioners failed and refused to give him any further medical attention or care.

The District Court below granted petitioners' motion for summary judgment without a written opinion. In the appeal below, respondent in his statement of the issues presented for review assigned, among other issues, the following:

> "Is he compelled to meet trustee regulations even though he admittedly was too ill to comply therewith, such illness having been contracted as a result of working in the coal mines since 1929?"

ARGUMENT

As we shall demonstrate below, there are no valid reasons for granting the writ. A careful reading of the petition illicits the information that the petitioners agree there are vested rights in respondent, and others, but that they have become divested upon the passing of a new resolution. They agree that respondent had all the eligibility requirements under Res. 10 (App. to Pet. at pp. 14a, 15a), except age.

This resolution provided that respondent would be eligible for pension if he attained the age of 60 years, or over, at the time of his application for pension. However, by petitioners subsequent Resolution 63, dated January 4, 1965 (App. to Pet. at pp. 18a to 20a) the requirement of age 60 was lowered to 55 years or over at the date of his application for pension. This change was made specifically applicable to an applicant *who prior to February 1, 1965 had permanently ceased work in the bituminous coal industry as an employee of an employer signatory to the National Bituminous Coal Wage Agreement of 1950, as amended.* Respondent had permanently ceased working in the coal industry as of 1955, suffering from silicosis (black lung disease). Under Res. 10, respondent could not have been awarded a pension until age 60. Res. 63 did not provide that prior 20 years' service was repealed, but merely provided that any applicants who had not already served twenty years under a prior resolution, must so serve 20 years within a 30-year period prior to filing application for pension. The 20 within 30 year requirement, therefore did not apply to Lavella, who was clearly entitled to a pension when he reached age 55. He worked for a signatory operator, Shawmut Mining Company and New Shawmut Mining Company, who contributed to the pension fund upon coal produced by Lavella and other miners. In addition, petitioners arbitrarily thwarted and called for naught, respondent's employment in the coal mines from 1929 to 1937, being arbitrary in not giving him credit therefor, and disregarding the very purposes of Sec. 302(c)(5), Labor Management Relations Act, 1947 (61 Stat. 157; 29 U.S.C. Sec. 186(c)(5); the purpose of which was to provide pensions to coal miners who had already worked in the mines for a long time prior to passage of the Act in order to have them continue in the mines, and be an incentive to obtaining a pension after twenty years of work in the coal industry.

AS TO VESTING OF RIGHTS IN THE COAL MINER BENEFICIARIES OF THE TRUST

It has long been recognized in private pension plans that employees have vested rights to pension benefits. The term, "vesting" refers to an employee's *nonforfeitable right* to share in his pension fund even if he leaves his job before retirement, (italics ours). The Labor Management Relations Act, supra, Sec. 186(c)(5) provides that the money paid to the trust fund is "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from *occupational activity* or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; * * *." (Italics ours).

The appellate court below correctly held that respondent's rights vested under Res. 10, supra, except for his age. Res. 63, supra, reducing the age to 55 did not specify that coal mine employees would be excluded from obtaining pensions, who had qualified prior thereto except for age. The resolution was not made retroactive and could not equitably so provide.

Petitioners quote from dicta of Judge Leventhal on page 9 of their petition. Suffice it to say, however, that when petitioners in the court below filed a suggestion for a rehearing *en banc* on the same question of vesting and maturing of pension rights, as they petition here, no Judge requested a vote thereon, which included Judge Leventhal.

It is elementary law that trustees of a trust, statutory, testamentary, or otherwise, hold the legal title to the trust *res;* and therefore the provision in the trust indenture that title vests in the trustees of the fund so that no benefits or monies payable from the fund shall be subject to transfer, assignment, pledge, etc., meaning also that the monies are not subject to attachment. However, the trustees hold the legal title to the moneys in the fund merely for the sole use and benefit of the beneficiaries of the trust, such as respondent, and other coal miners, for award of pensions, etc. It is fundamental that equity has exclusive jurisdiction of trusts, statutory, or otherwise, and that the trustee's only duty is to the beneficiaries thereof, which closes the door to any argument whether a beneficiary thereof has a vested right therein, or a matured right. The petitioners would have this Court believe that they as mere trustees of the fund had authority to provide for vested rights in the beneficiaries, but it is elemental that they have no such power. Their sole duties and responsibilities have been outlined above. The settlors of the trust made it very clear that the trust is for the sole and exclusive benefit of the employees as set forth in the trust instrument and did not give the trustees *power,* or *discretion,* to change or divest such benefits in any manner, shape, or form. What clearer language could the settlors have used to show that the beneficiaries were the only persons in whom the rights under the trust vested and matured? The trust does not provide that such rights shall exist at the whim and caprice of the trustees, as contended by petitioners. The court below was therefore abundantly correct in holding that when respondent had qualified under Res. 10, supra, his right to pension fully vested when he became 55 years of age, and as his employers had contributed to the Pension Fund in behalf of respondent, a subsequent resolution could not wipe out respondent's vested and matured rights. This Court is asked by petitioners to hold that all rights and contributions to the Fund obtained by respondent should be confiscated and forfeited because by the passage of a subsequent resolution they could equit-

ably do so at will. The lower court gave no credence to such a request.

THE ERRONEOUS CLAIM OF PETITIONERS THAT THE OPINION BELOW COULD PUT THE FUND IN FINANCIAL JEOPARDY

The petitioners want this Court to review the opinion below on information they do not possess and on conclusions, arguing that the opinion has a financial impact on the trust fund, or may have that effect. There is nothing in the record herein to support their claim; nor did the appellate court have that question before it. Throughout the entire record of this case, these removed trustees have not shown the slightest interest in respondent's permanent black lung disability caused by his occupational activity while working in the coal mines, and they pray the aid of this Court to continue their efforts to defeat respondent's claim for pension.

This Court is not interested in experiences under the Federal Coal Mine Health and Safety Act of 1969, having already been advised by respondent and petitioners that the trust indenture fully provides for care of black lung victims and payments of pensions to them, a duty which petitioners have totally disregarded as found by the court below.

Their statement on page 11 of their petition for the writ that the fund could be inundated because of this coal miner's claim for pension, and others similarly situated, is a conclusion and a supposition which this Court cannot and would not review. It is to be noted that the Lavella doctrine is not as stated by petitioners. The Court below did not hold as a general principle that all black lung victims are entitled to pensions, as petitioners would have this Court believe. The lower court correctly held that Lavella had qualified under Res. 10 except for age: and went on further to hold that because of his black lung permanent disability he could no longer work in the coal industry. Petitioners ask this court to uphold their contention that under

a later resolution, respondent had to keep on working, whether he could or not, in order to qualify for pension. Such a position of any trustee is untenable and contemptible.

Their contention that the current number of Fund pensioners would increase by one-third to over 100,000 is based solely on supposition unsupported by any evidence in the record. This Court will hardly review the case below because two suits have now been filed thereunder.

It is astounding to read their supposition and fear in the petition that the opinion of the court below could put the fund in financial jeopardy when in the certified report of the United Mine Workers of America Welfare and Retirement Fund for the year ending June 30, 1970, it is stated that the fund had an *unexpended* balance on June 30, 1970 of *$151,088,014 after* the income for that year and expenditures for pensions, hospital and medical care, etc. and administration expenses of *$5,689,206,* (italics ours).

The writ should not be granted because disability suits have since been filed. They want this Court to hold that coal miners should be barred from bringing disability suits, questioning their administration of the trust. Another error is the statement in the petition at page 12 that the lower court granted respondent a disability pension. A reading of the opinion shows it granted an award of pension on the merits, but petitioners complain that their discretionary powers have been interferred with. They question the power of the court below to correct, or interfere with, their *discretion.* It is elemental that an equity court will correct an abuse of discretion, etc., as was necessary to be done in the case at bar. Petitioners do not point out the problems which they allege are financial and equitable. We have already pointed out that with their huge unexpended balance on hand as of June 30, 1970, they had no financial problems. It is erroneous for them to give this Court the impression that the pie (trust fund) is in any way liable to be put in financial jeopardy because respondent, and other black lung victims, qualify for pension.

It is further error to assert that the trustees did not provide for disability pensions for employees in the coal industry. The trustees have no power to make such provisions. The settlors of the trust created the trust indenture; not the trustees, and it is clear what the trust provides for.

Petitioners cite *Lee v. Nesbitt, et al.*, Trustees of the National Maritime Trust (C.A. 9th), No. 25973, not yet reported, wherein they state the involuntary separation came about "because he [was] unable to obtain employment due to the temporary unavailability of jobs." Suffice it to say that the court below gave the reason for the involuntary separation of Lavella as due to permanent black lung disease contracted during his many years of work as a coal miner; and that it was impossible for him to continue work in the coal industry.

THE DECISION BELOW IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT, AND THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHEN PENSION RIGHTS VEST; CONTRA, THEY AGREE WITH THE DECISION AT BAR

The lower court did not hold that respondent had a vested right in the royalties, or contributions, paid into the trust fund, but held he had sufficiently vested rights in 1952 under the facts of the case. The holding of this Court in *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), a bankruptcy case, is not applicable.

In *Joint Industry Board of Electrical Industry v. United States*, 391 U.S. 224 (1968), a bankruptcy case, it was held by this Court that the contributions to the welfare fund were payable only to the trustees, and that nothing was payable to employees *except upon the occurrence of certain events* (italics ours). These events were stated at page 227 as:

> "Until death, retirement after age 60, *permanent disability*, entry into military service, or cessation of participation under the plan, no benefits were payable." * * * (Italics ours)

In the case at bar, the court below held that the respondent suffered from *permanent disability* as therein stated, and was entitled to pension. Therefore, the respondent's case is not in any way in conflict with the two decisions of this Court just cited.

We will demonstrate below that none of the cases cited by petitioners which were decided in the various circuits are in conflict with the decision at bar as to when pension rights vest.

In *Schneider, et al. v. McKessin & Robbins, Inc.*, 254 F.2d 827, (C.A. 2, 1958), it was held that under the plan, pensions were payable only to participants and appellants ceased to be participants when they were discharged. Respondent here was not discharged but was totally prevented from continuing his occupation in the coal industry because of black lung disease. The court in *Schneider* held that under the facts, appellants had no interest in the pension fund.

Petitioners cite, *Sparta v. Lawrence Warehouse Company, et al.*, 368 F.2d 227 (C.A. 3, 1966), in which the court recognized vested rights such as here claimed. We quote from page 228 of the opinion, as follows:

> "* * * Indeed, the measure of the vested pension rights of any employee who retired shortly thereafter and before the December, 1961, amendment would necessarily be increased by taking into account the interest relinquished by the plaintiff.* * *". (Italics ours).

In *Finell, et al. v. Cramet, Inc., et al.*, 289 F.2d 409, (C.A. 6, 1961), the employees who brought the suit were discharged by their employer prior to termination of employer's business, and who were not eligible for retirement benefits, had no interest in the trust fund. Again such facts are entirely dissimilar with the facts in the case at bar. Respondent here had never been discharged by his employer.

Again, *Smith v. Union Carbide Corporation*, 350 F.2d 258, (C.A. 6, 1965), supports the case at bar and is not in conflict therewith.

The appellate court remanded the case back to the arbitrators to decide the question of total and permanent disability of the appellant. The court below in the Lavella case correctly decided that he was permanently disabled and petitioners did not show otherwise.

Suffice it to say that in *Local Lodge 2040, Internat'l Assn. of Mach. v. Servel, Inc.*, 268 F.2d 692 (C.A. 7, 1959), that court in regard to vested rights of employees held as follows at page 695:

> "* * * The unions claim no pecuniary interest in the benefits the individual plaintiffs seek to recover, and they could not properly do so *since these rights flow directly to the employees.* * * *" (Italics ours).

THE FEDERAL LAW ESTABLISHED IN THE LAVELLA CASE IS NOT NEW BUT ELEMENTARY

Petitioners' contention is that the lower court's finding that respondent is a black lung victim discriminates against those who are well and able to continue work in the coal industry and may some day deprive them of pension. They pray that this Court hold that black lung victims with 20 years' service (whose employers contributed to the pension fund, as here), constitute a class of beneficiaries without vested rights. Such beneficiaries are chastised by petitioners for "not having to work" and for being entitled to a retirement pension when they reach retirement age. The petitioners ignore the fact that respondent was unable to continue work in the coal industry because of his occupational disease contracted on the job. They try to justify their position by comparing respondent's status to an employee discharged, or laid off for cause, or economic conditions. Such a comparison is not only unfair but inequitable. They are praying this Court to review the decision and decide what illnesses of miners are "endemic to the industry." It is elemental that the dread disease of black lung is endemic to the coal industry.

The decision they seek to have reviewed does not in any way apply to a miner who involuntarily ceased work because of illness or injury resulting from *non-mining connected illnesses or injuries.*

As to *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), the case at bar does not involve the enforcement of collective bargaining agreements but a proper and equitable administration of the trust indenture which the discharged petitioners failed to perform, as heretofore stated.

As apropos, we quote the following two sentences from the decision of this court in Benedict at page 468:

> "* * * It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employers in many other industries assume this burden directly, this welfare fund was jointly created by the coal industry and the union for that purpose. * * *"

This Court has, therefore, already established a body of federal law concerning the trust fund here in question and so have the federal cases cited by petitioners, all of which support respondent.

In reference to pension plans and rights of employee, we quote the following from Sec. 4. Contractual obligation, in 42 A.L.R. 2d (Ann.) at page 469:

> "* * * It seems clear that where the pension plan is reached as a result of collective bargaining and is embodied in a labor contract, it is contractual in nature and enforceable according to its terms. * * *"

In *Vallejo, et al. v. American R. Co. of Puerto Rico, et al.*, 188 F.2d 513 (C.C.A. 1) (1951), it was held in a collective bargaining agreement with a union that appellants (employees) were considered qualified and entitled to pension when satisfying the requirements as to age and service. That upon meeting these requirements an employee's pension rights has matured.

Finally, the questions of vested rights and matured rights of an applicant for pension in the administration of the United Mine Workers of America Welfare and Retirement Fund of 1950, were included in *Kosty v. Lewis,* 319 F.2d 744, (D.C. Cir. 1963) in which this Court denied certiorari, 375 U.S. 964 (1964).

Petitioners have failed to show special and important reasons under Rule 19(b) of this Court.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Robert C. Handwerk
Counsel for Respondent

July 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-13

W. A. BOYLE, C. W. DAVIS, and JOSEPHINE ROCHE, Trustees, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,

Petitioners,

v.

THOMAS LAVELLA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THOMAS LAVELLA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to this Court's Rule 24(5), Petitioners, the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, file this Supplemental Brief calling this Court's attention to intervening matter not available either on July 2, 1971, when their certiorari petition was filed, or on July 29, 1971, when Respondent filed his opposition brief.

SINCE THE LAST FILING HEREIN, THE NINTH CIRCUIT HAS TAKEN ADDITIONAL ACTION IN LEE v. NESBITT, ET AL., TRUSTEES OF THE NATIONAL MARITIME TRUST

In assigning the Reasons for Granting the Writ herein, Petitioners emphasized (Pet. 11) that the impact of the District of Columbia Circuit's opinion in the instant case could put the Trust Fund in financial jeopardy and discussed and appended to their certiorari petition (Pet. 13, fn. 12) the Ninth Circuit's recent decision in *Lee v. Nesbitt, et al., Trustees of the National Maritime Trust*, No. 25973, decided June 11, 1971 (not yet reported), holding that where an employee met all qualifications for pension benefits except age, he could not be denied pension benefits because of a subsequent involuntary separation from covered employment required for qualification. The certiorari petition (Pet. 16) observed that *Lee* "goes further than *Lavella*" (the instant case) and that both conflict with decisions in the Second, Sixth and Seventh Circuits.

Since Petitioners filed their certiorari petition herein on July 2, 1971 and Respondent filed his opposition brief on July 29, 1971, Petitioners have been advised that the Ninth Circuit, on August 13, 1971, entered an order in *Lee*, which provided that:

> "Defendants-Appellants, having filed a Petition for Rehearing (etc.) and this being a proper instance for the plaintiff-appellee to answer same; said plaintiff-appellee is requested to prepare and file such answer within 20 days, with copies to defendants-appellants."[1]

Though, as Petitioners are advised, plaintiff-appellee in the Ninth Circuit's *Lee* has filed an answer, the Ninth

[1] See Appendix A for copy of the Ninth Circuit's order of August 13, 1971.

Circuit has not yet rendered a final decision on the rehearing petition; but should the Ninth Circuit reverse its holding noted above, the Ninth Circuit would then have to be added to those Circuits with whose holdings *Lavella* (the instant case) would conflict.

CONCLUSION

Having thus apprised this Court of the foregoing intervening matter not available when the instant certiorari petition was filed, Petitioners again submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

September 15, 1971.

APPENDIX

APPENDIX A

Entered August 13, 1971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HANDEE T. LEE,
Plaintiff-Appellee,
v.
ROBERT NESBITT, JAMES J. MARTIN, JOSEPH CURRAN, and all others who are Trustees of the National Maritime Trust,
Defendants-Appellants.

No. 25973

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges

ORDER

Defendants-Appellants, having filed a Petition for Rehearing (etc.) and this being a proper instance for the plaintiff-appellee to answer same; said plaintiff-appellee is requested to prepare and file such answer within 20 days, with copies to defendants-appellants.